

Supreme Court, U. S.

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MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. **77-1768**

ROBERT CHARLES THOMAS,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF TEXAS**

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ROBERT CHARLES THOMAS,

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THE STATE OF TEXAS,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF TEXAS**

The Petitioner, ROBERT CHARLES THOMAS, respectfully prays that a writ of Certiorari issue to review the judgment and opinion of the Court of Criminal Appeals of Texas entered in these proceedings February 15, 1978. Petitioner's Motion for Rehearing En Banc was denied March 15, 1978.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas, reported at 562 S.W.2d 240, appears in the Appendix hereto.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether the Texas procedure for the determination of competency is unconstitutional on its face and as applied because it denies criminal defendants their right to be convicted only when competent and to a determination of competency.

2. Whether Petitioner was denied due process of law and equal protection of the law when he was convicted and sentenced without a preliminary hearing as to his competency.

STATUTORY PROVISIONS INVOLVED

TEX. CODE CRIM. PROC., Art. 46.02 §1-4, appears in the Appendix hereto.

STATEMENT OF THE CASE

Petitioner pled guilty on March 11, 1977 in Causes No. F-77-1743-IN and No. F-77-1744-IN, to aggravated rape and aggravated robbery. The two cases were tried together by agreement of counsel. On March 16, 1977, Petitioner wrote a letter to the Court (TR 14, 15)¹ making reference to having no will to live and having serious problems. The

¹ References to "TR" refer to "transcript", the term used in Texas for the record on appeal. References to "S/F" refer to "Statement of Facts", the term used in Texas for the transcription of trial testimony.

Petitioner was sentenced on April 1, 1977 and filed, although they are not discussed in the pleading, waivers of Motions For New Trial and waiver of Right To Appeal.

On April 5, 1977, the Petitioner filed a pro se, out of time Motion For New Trial and requested a mental evaluation, again referring to his mental problems. The Court apparently exercised its discretion and permitted the filing of the Motion. On April 29, 1977, a ruling on the Motion was continued because the Petitioner and his attorney continued to point out to the Court that there was some question as to his mental capacity. (S/F 22-24).¹ The Court continued the hearing so that a psychiatrist could examine the Petitioner. At this hearing, the Petitioner pointed out to the Court that he could not say if he was sane or insane, that sometimes he understood things and sometimes he did not, and he could not say if he understood things at the time of his trial. He pointed out that the Sheriff's Department in charge of the jail had placed him in the "mental tank." (S/F 22-23).

On May 6, 1977, the Court ordered a psychiatrist, Dr. James Grigson, to examine the Petitioner. (TR 21) There must have been some communication between the Court and Dr. Grigson before this, however, because in Dr. Grigson's letter back to the Court (TR 22) he referred to having seen Petitioner on May 5, 1977, one day before he was requested by the Court to do so.

On May 11, 1977, after Petitioner had been seen by the court-appointed psychiatrist, Petitioner made a motion for his own psychiatrist to be appointed. There is nothing in the records to indicate that this was done. (TR 23-25)

On May 20, 1977, the court overruled Petitioner's Motion For New Trial and sentenced him to a term of 10

years in the Texas Department of Corrections in No. F-77-1743-IN and 20 years in No. F-77-1744-IN. Petitioner gave timely notice of appeal to the Court of Criminal Appeals in Austin, Texas.

On appeal, Petitioner raised the issue of the Court's failure to hold even a preliminary hearing as to incompetency in his sole ground of error (Brief for Appellant, page 3), citing Petitioner's right to hearing under the Fourteenth Amendment of the United States Constitution (Brief for Appellant, page 6). The Court held that no hearing was required on Petitioner's claim of incompetency, (Opin. page 4), and dealt with Petitioner's Constitutional claim (Opin. page 3). In his Brief in Support of Motion for Rehearing, Petitioner reiterated this Ground of Error and emphasized that the trial court's failure to grant a preliminary hearing violated due process (Brief On Motion For Rehearing, pages 3-5). The Motion For Rehearing was denied without opinion.

REASONS FOR GRANTING THE WRIT

I. TEXAS LAW ERODES THE CRIMINAL DEFENDANT'S RIGHT TO A DETERMINATION OF COMPETENCY BY ERECTING BARRIERS TO THE RECEIPT OF EVIDENCE OF INCOMPETENCY.

The Texas Code of Criminal Procedure provides a two-tiered process for determining a defendant's competency to stand trial. In the first tier, the Court is required to hold a preliminary "hearing" and to rule as to whether there is evidence to support a finding of incompetency. TEX. CODE CRIM. PROC. Art. 46.02(2)(b). If the judge finds such evidence, a jury must determine the defendant's competency. TEX. CODE CRIM. PROC. Art. 46.02(4)(a).

This case, like a number of other recent Texas cases, presents the difficulties a defendant has in invoking the

first tier of this procedure. While the language of Art. 46.02(2)(b), "If during the trial evidence of the defendant's incompetency is brought to the attention of the court from any source, the court must conduct a hearing . . ." would seem to suggest that very little evidence is required to raise the issue, it has not been so interpreted by the Texas Court of Criminal Appeals. In an en banc opinion in *Johnson v. State*, No. 54,058, decided April 26, 1978, the court held,

By its use of the terms "evidence . . . from any source," Art. 46.02(2)(b) merely reiterated the language of *Townsend*, supra, in which we noted that a bona fide doubt in the mind of a trial judge as to a defendant's competency may stem 'from personal observations, or facts known to him, or from evidence presented, or by motion of the accused or his counsel, or by affidavit or from any reasonable claim or credible source.' Thus, the words "any source" as they are employed in Art. 46.02(2)(b) and the decisions of this Court speak to the origin of proof, not to its probative weight.

That the judge may consider evidence from *any source* should not be construed to mean that just *any evidence* will require the court to halt a defendant's trial and determine whether an issue as to his competency exists. In enacting Art. 46.02(2)(b), the Legislature neglected to specify the standard of proof which must be met before an interruption of trial proceedings will be required. By its omission, however, the Legislature did not intend to abrogate the 'bona fide doubt' standard to which this Court has so long adhered.

Thus, in order for the judge to consider *whether an issue as to competency exists*, he must have a "bona fide doubt" as to competence. Clearly, the court has confused the standard of *Pate v. Robinson*, 383 U.S. 375 (1966), which requires the Court to conduct a *full scale hearing* if there is a bona fide doubt as to competency, with the Texas procedure designed to determine *whether there is such a doubt*. The result of this confusion is that a Texas defendant is not given adequate opportunity to present the evidence that would create doubt as to his competency.

In the case at bar, the following were deemed insufficient evidence to merit even a preliminary inquiry into competence:

- a letter to the court describing serious mental problems
- request for mental evaluation
- statements by Petitioner and his attorney that there was an issue as to his competency
- statement by Petitioner that he wasn't sure he understood things at the time of trial
- placing of Petitioner in the "mental tank" by the sheriff's department.

While this may not amount to a bona fide doubt, it requires further inquiry. To give substance to the guarantee of *Pate*, Petitioner must be afforded the protection of an adversary proceeding to determine the necessity or lack thereof of submitting the issue to a jury. Neither a request for examination by a state psychiatrist (made and granted here) nor a general question as to why a defendant should not be sentenced will suffice in the face of evidence such as that here. Had further inquiry been made here, defendant could have shown that he had suf-

fered from dizziness, blackouts and poor memory in jail and for about a year and a half prior to trial, that he was given medication for this while in jail, that there is a history of mental illness in his family (his father, brother and grandfather have all been institutionalized), and that he had had problems with alcohol for a two year period prior to trial.

Nor is defendant's case unique in Texas law. In *Johnson, supra*, the court held that testimony by defendant's brother that defendant had been institutionalized previously and that he was "out of control" did not raise the incompetency issue. In *Paul v. State*, 544 S.W.2d 668 (Tex. Crim. App. 1976) no hearing was required, even though defendant testified that he had been committed to mental institutions twice and that he had not been discharged the second time but had escaped, and a psychiatric report cast doubt on his sanity at the time of the offense. See also *Ainsworth v. State*, 493 S.W.2d 517 (Tex. Crim. App. 1973), *Wages v. State*, 501 S.W.2d 105 (Tex. Crim. App. 1973), *Quintanilla v. State*, 508 S.W.2d 647 (Tex. Crim. App. 1974), *Jackson v. State*, 509 S.W.2d 570 (Tex. Crim. App. 1974), *Bonner v. State*, 520 S.W.2d 901 (Tex. Crim. App. 1975) and *Cato v. State*, 534 S.W.2d 135 (Tex. Crim. App. 1974).

Under the Texas procedure, the *Pate v. Robinson, supra*, guarantee of a competency hearing is an empty one.

II. THE PROBLEM OF DETERMINING COMPETENCY IS PARTICULARLY SENSITIVE IN THE GUILTY PLEA SITUATION, WHERE THE CONTACT OF THE COURT WITH DEFENDANT IS MINIMAL.

Since a guilty plea is a conviction and "involves the defendant's waiver of precious constitutional rights," *Saddler v. United States*, 531 F.2d 83, 85 (2d Cir. 1976), *Kercheval v. United States*, 274 U.S. 220 (1927), it is essential that a defendant be competent and able to understand the proceedings. Similarly, he must be competent at sentencing so as to exercise his right of allocution. Moreover, the determination of a defendant's competency to plead guilty is complicated by the fact that a guilty plea proceeding does not give the court the opportunity to observe the defendant over a long period of time, as does a trial. Further, factual evidence is usually not presented on a guilty plea; such evidence might peripherally suggest incompetence to the court. These factors make it important that a defendant who pleads guilty be given a formal opportunity to raise the incompetency issue if the judge has any suspicion that an issue might exist.

This case presents a serious issue in Texas law, going to basic rights of criminal defendants. It should be resolved once and for all by this court.

III. THE CONSTRUCTION OF THE TEXAS STATUTE BY TEXAS COURTS IS CLEAR.

The state's highest criminal court, the Court of Criminal Appeals, has recently construed the specific provision at issue here. *Johnson v. State, supra*.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Criminal Appeals of Texas.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX A

OPINION OF THE COURT BELOW

ROBERT CHARLES THOMAS, JR.,

Appellant

NOS. 57,066 and 57,067 v. - - - Appeals from DALLAS County
THE STATE OF TEXAS,

Appellee

These are appeals from convictions for attempted rape and aggravated robbery. Appellant entered pleas of guilty before the trial court and received sentences of ten years and twenty years respectively, in the Texas Department of Corrections.

In his sole ground of error, appellant contends that the trial court erred in failing to conduct a hearing to determine appellant's competency to stand trial. See Art. 46.02, Secs. 2, 3 and 4, Vernon's Ann.C.C.P.

On March 11, 1977, appellant entered his pleas of guilty. The trial court carefully admonished appellant under Article 26.13, Vernon's Ann.C.C.P., and additionally inquired into matters not required by that statute.¹ After the court ascertained that appellant fully understood the admonishments, it ascertained that appellant understood that he was waiving his trial rights; that he was satisfied with his representation by his attorney; that he was twenty-seven years old and had completed college with a degree in accounting; that he had worked as an accountant; that he had never been treated for mental illness; that he had a rational, as well as factual, understanding of the proceedings; and that he understood all

¹ The trial court is to be commended for taking such care in inquiring into a defendant's understanding of the trial proceedings and his plea, especially where there is any question of incompetency.

that the trial court had asked him and had no questions about the proceedings. Then the trial court questioned appellant's attorney, who stated that appellant had been able to aid and assist her in the preparation of his defense and that she thought that appellant had a factual, as well as rational, understanding of the proceedings. The court then ruled that appellant appeared to be mentally competent.

Appellant then testified as to the alleged offenses, after which the trial court found him guilty as charged. The record reflects that appellant subsequently wrote a letter to the trial judge, which was filed on March 21, 1977. In his letter, appellant apologized for committing the crimes and asked the judge for mercy in sentencing. He also stated that he did not understand why he had committed the offenses and said that he wanted to help in overcoming his "sickness."

On April 1, 1977, the trial court sentenced appellant to serve the ten and twenty year terms. On April 5, appellant filed a pro se motion for new trial in both causes, in which he requested a psychiatric examination. On April 29, 1977, the trial court held a hearing on the motion for new trial. Appellant testified that he wanted a mental examination in order to "really know what [his] problem is." He stated that "sometimes I understand things and sometimes I don't." The trial court questioned him and ascertained that he had never before been treated for mental illness nor had he ever been adjudicated incompetent or insane. Appellant then stated that he had been placed in the "mental tank" in the county jail and that he had been put on medication.

His attorney stated again that he had been able to aid and assist her in the preparation of his defense and that

he understood what went on at his trial. Appellant then stated that he thought that he was not rational and competent at the time he committed the offenses, because "if [he] would've been [he] wouldn't have done it . . ."

The trial court then decided to appoint a psychiatrist to examine appellant.² The record reflects that a letter was sent to the trial judge by the psychiatrist, stating that the psychiatrist examined appellant and found him to be competent to stand trial.

The record then reflects that appellant made a pro se motion, dated May 11, 1977, for the appointment of an expert-witness psychiatrist. In this motion he stated that there was a history of mental illness in appellant's family, and that the "issue of insanity has been established fact since [the] date of arrest . . ."

On May 20, the court continued the hearing on the motion for new trial. The court overruled the motion and stated:

"Show in the record, please, the Court has on two occasions prior to trial — one as a result of statements made by this Defendant at the last hearing — requested and appointed a psychiatrist to examine him. On both occasions the psychiatrist said that he was competent both prior to trial and after his request was made at the hearing last time this case was set and the Court finds that there is not sufficient evidence to support a finding of incompetency . . ."

² The docket sheet reflects that on April 29, 1977, the prior sentence was withdrawn in order for the trial court to rule on appellant's motion for new trial.

Appellant was then re-sentenced to the ten and twenty year terms.

We have concluded that appellant's ground of error is without merit; the trial court did not err in refusing to hold a hearing on appellant's competency to stand trial since the evidence before the court was not sufficient to raise that issue.

It is well settled that the conviction of an accused, while he is legally incompetent to stand trial, violates due process. *Bishop v. United States*, 350 U.S. 961, 76 S.Ct. 440, 100 L.Ed.2d 835 (1956); *Bonner v. State*, 520 S.W.2d 901 (Tex. Cr.App. 1975); *Perryman v. State*, 494 S.W.2d 542 (Tex.Cr. App. 1973). The test of legal competence to stand trial is whether the accused has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational, as well as factual, understanding of the proceedings against him. Article 46.02, Sec. 1, Vernon's Ann.C.C.P.; *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960); *Paul v. State*, 544 S.W.2d 668 (Tex.Cr.App. 1976). Due process may, in certain circumstances, require that the trial court order a competency hearing, even absent any request to do so. *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966); *Paul v. State*, supra.

In the instant case, the trial court was relieved of any responsibility to hold a *pre-trial* hearing by virtue of appellant's announcement of ready and entry of a guilty plea without any suggestion of incompetency. *Paul v. State*, supra; *Perryman v. State*, supra.

At trial, the record reflects that the court carefully inquired into the matter of competency at the time of the guilty plea. The trial court carefully questioned both ap-

pellant and his attorney, before accepting the plea. See *Almand v. State*, 536 S.W.2d 377 (Tex.Cr.App. 1976).

After conviction, when appellant requested a psychiatric examination, the trial court had appellant examined. After such examination, the trial court ruled that there was no issue of incompetency raised. We agree. Appellant's insistence that he was "mentally sick" must be contrasted with the fact that his testimony at trial was clear and lucid; he admitted that he understood all of the proceedings; his attorney testified that he was able to assist in preparing his defense and that he understood the proceedings, a psychiatrist apparently examined him twice and both times found him to be competent.

A trial court is only required to sua sponte hold a competency hearing when sufficient facts or circumstances are brought to the court's attention, from any source, that create a reasonable doubt as to the competency of the appellant. *Bonner v. State*, supra; *King v. State*, 511 S.W.2d 32 (Tex. Cr. App. 1974); *Perryman v. State*, supra; *Wages v. State*, 501 S.W.2d 105 (Tex. Cr. App. 1973). In the instant case, all evidence before the trial court was insufficient to raise the issue of competency. *Paul v. State*, supra; *Almand v. State*, supra; *Jackson v. State*, 509 S.W.2d 570 (Tex. Cr. App. 1974); *Perryman v. State*, supra; *Ainsworth v. State*, 493 S.W.2d 517 (Tex.Cr. App. 1973). Therefore, we hold that the trial court did not abuse its discretion in failing to hold a hearing on appellant's competency to stand trial. See *Ainsworth v. State*, supra.

Appellant's ground of error is overruled.³

³ We note that there appears in the record a letter from appellant to the trial judge, filed October 3, 1977, in which appellant

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The judgments are affirmed.

W. C. DAVIS, Judge

(Delivered February 15, 1978)

By: Panel 1; 1st Quarter, 1978, composed of

Tom G. Davis, Judge
Carl E. F. Dally, Judge
W. C. Davis, Judge

details his reasons for believing that he is mentally disturbed. His discussion of his innocence of his prior conviction for rape, his marital problems, and his employment problems does not sufficiently raise the issue of his incompetency. The fact that appellant is sorry that he committed the offenses and that he may have had personal problems and stresses when he committed the crimes does not affect his competency to stand trial for them.

7a

APPENDIX B

**CLERK'S OFFICE
COURT OF CRIMINAL APPEALS OF TEXAS
AUSTIN, TEXAS**

I, THOMAS LOWE, Clerk of the Court of Criminal Appeals of Texas do hereby certify that in Cause No. 57,066 styled:

ROBERT CHARLES THOMAS, JR. APPELLANT

VS.

STATE OF TEXAS

APPELLEE

judgment of the 195th. Judicial District Court of Dallas County, Texas was Affirmed on February 15, 1978. On March 15, 1978, the Appellant's Motion for Rehearing En Banc was Denied.

THEREFORE, with the Affirming of this Judgment, the Denial of the Motion for Rehearing En Banc, The Mandate of this Court was issued on March 17, 1978, the Appellant has exhausted all remedies in this, the Court of Criminal Appeal of Texas and judgment has now become final on the docket of this Court.

WITNESS my hand and the Seal of this Court, at office in Austin, Texas, this the 30th. day of May, 1978.

THOMAS LOWE
Clerk, Court of Criminal Appeals
of Texas

By /s/ Belva Myler Deputy

CLERK'S OFFICE
COURT OF CRIMINAL APPEALS OF TEXAS
AUSTIN, TEXAS

I, THOMAS LOWE, Clerk of the Court of Criminal Appeals of Texas do hereby certify that in Cause No. 57,067 styled:

ROBERT CHARLES THOMAS, JR. APPELLANT

VS.

STATE OF TEXAS

APPELLEE

judgment of the 195th. Judicial District Court of Dallas County, Texas was Affirmed on February 15, 1978. On March 15, 1978, the Appellant's Motion for Rehearing En Banc was Denied.

THEREFORE, with the Affirming of this Judgment, the Denial of the Motion for Rehearing En Banc, The Mandate of this Court was issued on March 17, 1978, the Appellant has exhausted all remedies in this, the Court of Criminal Appeal of Texas and judgment has now become final on the docket of this Court.

WITNESS my hand and the Seal of this Court, at office in Austin, Texas, this the 30th. day of May, 1978.

THOMAS LOWE
Clerk, Court of Criminal Appeals
of Texas

By /s/ Belva Myler Deputy

APPENDIX C

TEXAS CODE OF CRIMINAL PROCEDURE,
art. 46.02 §§1-4

Incompetency to Stand Trial

Section 1. (a) A person is incompetent to stand trial if he does not have:

- (1) sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding; or
- (2) a rational as well as factual understanding of the proceedings against him.

(b) A defendant is presumed competent to stand trial and shall be found competent to stand trial unless proved incompetent by a preponderance of the evidence.

Raising the Issue of Incompetency to Stand Trial

Sec. 2. (a) The issue of the defendant's incompetency to stand trial shall be determined in advance of the trial on the merits if the court determines there is evidence to support a finding of incompetency to stand trial on its own motion or on written motion by the defendant or his counsel filed prior to the date set for trial on the merits asserting that the defendant is incompetent to stand trial.

(b) If during the trial evidence of the defendant's incompetency is brought to the attention of the court from any source, the court must conduct a hearing out of the presence of the jury to determine whether or not there is evidence to support a finding of incompetency to stand trial.

Examination of the Defendant

Sec. 3. (a) At any time the issue of the defendant's incompetency to stand trial is raised, the court may, on its own motion or motion by the defendant, his counsel, or the prosecuting attorney, appoint disinterested experts experienced and qualified in mental health or mental retardation to examine the defendant with regard to his competency to stand trial and to testify at any trial or hearing on this issue.

(b) The court may order any defendant to submit to examination for the purposes described in this article. If the defendant is free on bail, the court in its discretion may order him to submit to examination. If the defendant fails or refuses to submit to examination, the court may order him to custody for examination for a reasonable period not to exceed 21 days. The court may not order a defendant to a facility operated by the Texas Department of Mental Health and Mental Retardation for examination without the consent of the head of that facility or for a period exceeding 21 days. If a defendant who has been ordered to a facility operated by Texas Department of Mental Health and Mental Retardation for examination remains in such facility for a period of time exceeding 21 days, the head of that facility shall cause the defendant to be immediately transported to the committing court and placed in the custody of the sheriff of the county in which the committing court is located. That county shall reimburse the Texas Department of Mental Health and Mental Retardation facility for the mileage and per diem expenses of the personnel required to transport the defendant calculated in accordance with the state travel regulations in effect at the time.

(c) The court shall advise any expert appointed pursuant to this section of the facts and circumstances of the

offense with which the defendant is charged and the meaning of incompetency to stand trial.

(d) A written report of the examination shall be submitted to the court within 30 days of the order of examination, and the court shall furnish copies of the report to the defense counsel and the prosecuting attorney. The report shall include a description of the procedures used in the examination, the examiner's observations and findings pertaining to the defendant's competency to stand trial, and recommended treatment. If the examiner concludes that the defendant is incompetent to stand trial, the report shall include the examiner's observations and findings about whether there is a substantial probability that the defendant will attain the competence to stand trial in the foreseeable future. The examiner shall also submit a separate report setting forth his observations and findings concerning:

(1) whether the defendant is mentally ill and requires observation and/or treatment or hospitalization in a mental hospital for his own welfare and protection or the protection of others; or

(2) whether the defendant is a mentally retarded person as defined in The Mentally Retarded Persons Act (Article 3871b, Vernon's Texas Civil Statutes)¹ and requires commitment to a mental retardation facility.

(e) If the examiner is a physician and concludes that the defendant is mentally ill, he shall complete and submit to the court a Certificate of Medical Examination for Mental Illness. If the examiner concludes that the defendant is a mentally retarded person and the examination has been conducted at a facility of the Texas Department of

¹ Repealed; see, now, the Mentally Retarded Persons Act of 1977, classified as Vernon's Ann.Civ.St. art. 5547-300.

Mental Health and Mental Retardation or at a diagnostic center approved by the Texas Department of Mental Health and Mental Retardation, the examiner shall submit to the court an affidavit setting forth the conclusions reached as a result of the diagnostic examination.

(f) The appointed experts shall be paid by the county in which the indictment was returned or information was filed. A facility operated by the Texas Department of Mental Health and Mental Retardation which accepts a defendant for examination under Subsection (a) of this section shall be reimbursed by the county in which the indictment was returned or information was filed for such expenses incurred as are determined by the department to be reasonably necessary and incidental to the proper examination of the defendant.

(g) No statement made by the defendant during the examination or hearing on his competency to stand trial may be admitted in evidence against the defendant on the issue of guilt in any criminal proceeding.

(h) When a defendant wishes to be examined by a psychiatrist or other expert of his own choice, the court on timely request shall provide the examiner with reasonable opportunity to examine the defendant.

(i) The experts appointed under this section to examine the defendant with regard to his competency to stand trial also may be appointed by the court to examine the defendant with regard to the insanity defense pursuant to Section 3 of Article 46.03 of this code, but separate written reports concerning the defendant's competency to stand trial and the insanity defense shall be filed with the court.

Incompetency Hearing

Sec. 4. (a) If the court determines that there is evidence to support a finding of incompetency to stand trial, a jury shall be impaneled to determine the defendant's competency to stand trial. This determination shall be made by a jury that has not been selected to determine the guilt or innocence of the defendant. If the defendant is found incompetent to stand trial, a further hearing may be held to determine whether or not the defendant is mentally ill and requires observation and/or treatment or hospitalization in a mental hospital for his own welfare and protection or the protection of others or whether he is a mentally retarded person as defined in The Mentally Retarded Persons Act (Article 3871b, Vernon's Texas Civil Statutes), and requires commitment to a mental retardation facility.

(b) The defendant is entitled to counsel at the competency hearing. If the defendant is indigent and the court has not yet appointed counsel to represent the defendant, the court shall appoint counsel prior to the competency hearing.

(c) If the issue of incompetency to stand trial is raised other than by written motion in advance of trial pursuant to Subsection (a) of Section 2 of this article and the court determines that there is evidence to support a finding of incompetency to stand trial, the court shall set the issue for determination at any time prior to the sentencing of the defendant. If the competency hearing is delayed until after a verdict on the guilt or innocence of the defendant is returned, the competency hearing shall be held as soon thereafter as reasonably possible, but a competency hearing may be held only if the verdict in the trial on the

merits is "guilty." If the defendant is found incompetent to stand trial after the beginning of the trial on the merits, the court shall declare a mistrial in the trial on the merits. A subsequent trial and conviction of the defendant for the same offense is not barred and jeopardy does not attach by reason of a mistrial under this section.

(d) Instructions submitting the issue of incompetency to stand trial shall be framed to require the jury to state in its verdict:

(1) whether the defendant is incompetent to stand trial; and

(2) if found incompetent to stand trial, whether there is no substantial probability that the defendant will attain the competency to stand trial within the foreseeable future.

(e) If the jury is unable to agree on a unanimous verdict after a reasonable opportunity to deliberate, the court shall declare a mistrial of the incompetency hearing, discharge the jury, and impanel another jury to determine the incompetency of the defendant to stand trial.

(f) If the defendant is found competent to stand trial, the court shall dismiss the jury that decided the issue and may continue the trial on the merits before the court or with the jury selected for that purpose.

(g) If the defendant is found incompetent to stand trial and it is determined that there is a substantial probability that he will become competent within the foreseeable future, and the court determines there is evidence that the defendant is mentally ill or is a mentally retarded person, and all charges pending against the defendant are not then dismissed, the court shall proceed under Section 6 of this article or shall release the defendant.

(i) If the defendant is found incompetent to stand trial and there is found no substantial probability that he will become competent within the foreseeable future, and the court determines there is evidence that the defendant is mentally ill or is a mentally retarded person, and all charges pending against the defendant are then dismissed, the court shall proceed under Section 7 of this article or shall release the defendant.